SEP 14 1990

NO. 90-189

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

FL AEROSPACE,

Petitioner,

v.

AETNA CASUALTY & SURETY CO.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE OF MID-AMERICA LEGAL FOUNDATION

Pursuant to Rule 37.2 of this Court's Rules, Mid-America Legal Foundation, having been unable to obtain the consent of all the parties, moves for leave to file the attached brief Amicus Curiae in support of the petitioner for the following reasons:

1. The application by federal courts of state law in diversity cases is well-established.

2. The failure by a federal court to apply state law in a diversity case would undermine the foundations of the federal system.

3. Amicus Mid-America Legal Foundation is a non-profit corporation engaging in non-partisan legal research and representation in matters of public interest. Thus, Amicus Mid-America Legal Foundation presents an important, different and non-partisan perspective on the issue before this

Court, and Amicus Mid-America Legal Foundation respectfully submits that this motion for leave to file a brief amicus curiae should be granted.

Respectfully submitted,

/s/

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Dated: September 13, 1990

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INTEREST OF AMICUS CURIAE AND BACKGROUND OF THE CASE

Amicus Mid-America Legal Foundation respectfully urges that this Court grant certiorari in this case because the failure of a federal court to apply state law in a diversity case would be a serious blow to the federal system.

In the present case, the trial court properly held that, under Michigan law, Jonesville Products Inc. v. Transmerica Insurance Group, 156 Mich. App. 508, 402 N.W.2d 46 (1986), lv to appeal denied, 428 Mich. 897 (1987), an exclusion in an insurance policy that excepted discharges that were "sudden and accidental" did not apply if the discharges were "unexpected" and "unintended" from the standpoint of the insured.

On appeal, the Sixth Circuit found that, contrary to the published and unpublished opinions of the Michigan Court of Appeals, the Michigan Supreme Court would find "sudden and

accidental" to be unambiguous and have only a temporal meaning, that is, referring only to events of short duration. The failure of the Sixth Circuit to apply clearly articulated Michigan law in this case undermines the very foundation of the federal system.

CONSENT OF THE PARTIES

Although counsel to Aetna Casualty & Surety Company, Respondent, has refused to consent to the filing of this amicus brief, FL Aerospace, Petitioner, consents to Mid-America Legal Foundation's submission of this brief.

ARGUMENT

I.

THE FAILURE BY A FEDERAL COURT TO APPLY STATE LAW IN A DIVERSITY ACTION UNDERMINES THE FEDERAL SYSTEM

The issue presented in this case is of paramount importance to the effective and fair functioning of the federal system. The doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64

(1938) must be reaffirmed by this Court in order to clarify the limits inherent upon a federal court sitting in diversity. This Court should take this opportunity to reject the Sixth Circuit's failure to apply Michigan law under the guise of utilizing the principles of West v. AT&T Co., 311 U.S. 223 (1940).

Here, the highest court of the state, the Michigan Supreme Court, has not yet spoken on the meaning of the "sudden and accidental" language. However, opinions of the Michigan Court of Appeals, the Michigan intermediate appellate court, have held that "sudden and accidental" as used in the insurance policies mean "unexpected" and "unintended". Thus, there is Michigan law directly on point on this subject that the Sixth Circuit, under Erie, should have applied.

In reaching a result contrary to the opinions of the Michigan Court of Appeals, the Sixth Circuit also disregarded its own opinion in Wierczorek v. Volkswagenwerk, A.G., 731 F.2d 309

(6th Cir. 1984). In that case, the Sixth Circuit recognized that "[t]he law of Michigan is controlled by a decision of the Michigan Court of Appeals until the Michigan Supreme Court or another panel of the Michigan Court of Appeals rules otherwise." Id. at 310.

The Sixth Circuit, however, did not apply the Michigan Court of Appeals decisions. Instead, it reached a contrary result by utilizing "other persuasive data" referred to in West. However, even if "other persuasive data" properly were considered (which they should not be in view of clearly articulated Michigan law on this subject), they argue strongly for a result in line with the Michigan Court of Appeals decisions. Recently, the highest courts in two states have concluded that the "sudden and accidental" language should be given the same meaning as that given by the Michigan Court of Appeals. See Claussen v. Aetna Casualty & Surety Co., 676 F. Supp. 1571 (S.D. Ga. 1987), certified question to Sup. Ct. of Ga., 865 F.2d 1217 (11th

Cir. 1989), certified question answered, Claussen v. Aetna Casualty & Surety Co., 259 Ga. 333, 380 S.E.2d 686 (1989), 676 F. Supp. 1571, rev'd and remanded, 888 F.2d 747 (11th Cir. 1989); Just v. Land Reclamation, 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

Here, both the directly applicable decisions of the Michigan Court of Appeals, as well as "other persuasive data," even if properly considered, require that the Sixth Circuit should have applied Michigan law as articulated by the Michigan intermediate appellate courts. This Court should take this opportunity to reaffirm that a federal court cannot substitute its own views contrary to state law under the guise of utilizing the "other persuasive data" analysis referred to in West.

At a minimum, this Court should abstain from ruling on the petition for certiorari until the Michigan Supreme Court has ruled on the meaning of the policy language. The Michigan Supreme Court has now agreed to hear the appeals

in three cases decided by the Michigan Court of Appeals that have held that the "sudden and accidental" language means "unexpected and unintended." These cases are Upjohn Co. v. New Hampshire Insurance Co., 178 Mich. App. 706, 444 N.W.2d 813 (1989), lv to appeal granted, _____ Mich. App. ___ Nos. 86906-86908 (July 13, 1970); Polkow v. Citizens Ins. of America, 180 Mich. App. 651, 447 N.W.2d 853 (1990), lv to appeal granted, ___ Mich. ___ No. 87617 (July 13, 1990); Protective National Ins. Co. v. City of Woodhaven, No. 101968 (Mich. Ct. App. Sept. 28, 1988), lv to appeal denied, 432 Mich. 929 (1989), denial vacated and lv to appeal granted, ____ Mich. App. ___ No. 85180 (July 13, 1990). Because the Michigan Supreme Court, which is the proper forum to interpret Michigan law, now has those cases before it, this Court should abstain from ruling on the petition.

CONCLUSION

For the foregoing reasons, Amicus Mid-America Legal Foundation respectfully prays that this Court grant the petition of FL Aerospace for a Writ of Certiorari to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Dated: September 13, 1990

Respectfully submitted,

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